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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-605

AARON HENRY, et al.,
Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISSISSIPPI STATUTES INVOLVED

§ 2059.3. Conspiracy — unlawful restraint of trade — civil liability.

If two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchant or other person and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or

against which a boycott is attempted has no direct control or no legal authority to correct, or when the conspiracy results from such alleged grievance against the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed, then each of such persons shall be guilty of the crime of unlawful restraint of trade and shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned for not more than two (2) years and in addition each such person shall be liable in civil action for any damages suffered by said merchant or place of business so wrongfully boycotted and also for attorney fees incurred by said merchant or person boycotted in a civil action to recover damages.

* * * *

§ 1088. Trust and combine — defined.

A trust or combine is a combination, contract understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who is now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party

or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney-general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

* * * *

§ 1089. Additional contracts or combinations not allowed by law.

Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimical to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

(c) Or shall engross or forestall or attempt to engross or forestll any commodity;

(d) Or shall destroy or attempt to destroy competi-

tion in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another, differences of freight and other necessary expenses of operating business considered.

* * * *

§ 1092. Private persons and corporations may sue.

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages

of every kind sustained by him or it and in addition a penalty of five hundred dollars, by suit in any court of competent jurisdiction; said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. And such penalty may be recovered in each instance of injury. All recoveries herein provided for may be used for in one suit.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

Aaron Henry, individually and on behalf of all others similarly situated; National Association for the Advancement of Colored People; Mississippi State Conference of the National Association for the Advancement of Colored People; and Coahoma County Branch of the National Association for the Advancement of Colored People, individually and on behalf of all others similarly situated,

Plaintiffs,

versus

Civil Action
No. DC69-58-S

First National Bank of Clarksdale, individually and as representative of all others similarly situated Claiborne Hardware Company; Q. H. McDaniel, Jr., doing business as McDaniel Pharmacy; James E. Hudson,

George A. Hudson, and H. B. Hudson, Jr., doing business as Hudson Bros., trading as Piggly Wiggly Store and Hudson's Gift Shop; Waddy Abraham, doing business as Jitney Jungle; Louis N. Ellis, Executor of the Will and Estate of Michael Ellis, Deceased; Joe Elis, Mrs. Ben Mullen and Miss Ella Mae Ellis, doing business as George Ellis Food Store; Louis N. Ellis, doing business as Abe's Betty Jean and Port Gibson Trading Co.; H. D. Harwell, doing business as Mack's Package Store; Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store; W. H. Hay, doing business as O.K. Cleaners and Shirt Laundry; Murad Nasif and Mildred Nasif, doing business as M & M Super Store & Washateria; Port Gibson Lumber & Supply Co., Inc.; Charles R. Dobbs, doing business as Western Auto Associate Store; Kelly D. Conn, doing business as Auto-Lec Associate Store No. 225; A & P Service and Parts, Inc.; Allen Motor Co., Inc.; Donald-Segrest Ford, Inc.; Mrs. Edgar A. McCaa, doing business as Town and Country; and Mississippi Action for Progress, Inc.,

Defendants.

AMENDED COMPLAINT

Jurisdiction

1. This is an action for injunctive and declaratory relief to protect the rights, privileges and immunities of plaintiffs guaranteed by the Constitution and laws of the United States. This Court has jurisdiction of this

action under 28 U.S.C. §§ 1331, 1343, 2201 and 2202; 42 U.S.C. §§ 1981 *et seq.;* and the Constitution of the United States, including the First, Fifth, Seventh and Fourteenth Amendments thereto. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000. An actual controversy exists between the parties, as more particularly appears below.

Parties

2. Plaintiff Aaron Henry is a citizen of the United States and of the State of Mississippi. He resides in Clarksdale, Coahoma County, Missisippi. Plaintiff Henry is named as a defendant in an action known as *Claiborne Hardware Company, et al.* v *National Association for the Advancement of Colored People, et al.*, Cause No. 78353 in the Chancery Court of the First Judicial District of Hinds County, Mississippi (hereinafter sometimes referred to as the "state chancery suit"). Plaintiff Henry brings this action individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all individuals named as defendants in the state chancery suit.

3. Plaintiff National Association for the Advancement of Colored People (hereinafter "NAACP") is a corporation organized and existing under the laws of the State of New York, and has its principal place of business in New York City, New York. Plaintiff NAACP has, however, legally qualified to do business in the State of Mississippi.

4. Plaintiff Mississippi State Conference of the National Association for the Advancement of Colored People (hereinafter "State Conference") is an unincorporated association, resident of the State of Mississippi, and having property in the State of Mississippi. The State Conference is, in essence, an association consisting of the local branches described in ¶ 5 below. The State Conference is autonomous and independent of the NAACP. The State Conference has capacity to sue in this action under Rule 17(b) (1) of the Federal Rules of Civil Procedure.

5. Plaintiff Coahoma County Branch of the National Association for the Advancement of Colored People (hereinafter "Coahoma Branch") is an unincorporated association, resident of the State of Mississippi and Coahoma County, and having property in the State of Mississippi. The Coahoma Branch is a member of the State Conference. Other than that, the Coahoma Branch is autonomous and independent of the NAACP and the State Conference. The Coahoma Branch has capacity to sue in this action under Rule 17(b) (1) of the Federal Rules of Civil Procedure. Plaintiff Coahoma Branch brings this action individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all local NAACP branches in the State of Mississippi.

6. As to the classes named in ¶¶ 2 and 5 above, each class (a) is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to each class; (c) the claims of the representative of each class are typical of the claims

of the class; (d) the representative of each class will fairly and adequately protect the interests of the class as a whole; and (e) defendants have acted on grounds generally applicable to each class, thereby making final injunctive relief appropriate with respect to each class as a whole.

6. Defendant First National Bank of Clarksdale is, on information and belief, a national bank, resident and doing business in Clarksdale, Coahoma County, Mississippi. Said bank is a defendant in the state chancery suit. Numerous other banks in the State of Mississippi are also named as defendants in the state chancery suit. Defendant First National Bank of Clarksdale is sued individually and as representative of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all of the banks named as defendants in the state chancery suit. As to this class (a) it is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; (c) the defenses of the representative parties are typical of the defenses of the class; (d) the defendants will fairly and adequately protect the interest of the class; (e) plaintiffs and the class represented by the Coahoma Branch have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief with respect to the class as a whole; (f) the questions of law and fact common to the members of the defendant class predominate over any questions affecting only individual members; and (g) a class action is superior to other available methods for fair and efficient adjudication of the controversy.

7. Defendants Claiborne Hardware Company; Q. H. McDaniel, Jr., doing business as McDaniel Pharmacy; James E. Hudson, George A. Hudson, and H. B. Hudson, Jr., doing business as Hudson Bros., trading as Piggly Wiggly Store and Hudson's Gift Shop; Waddy Abraham, doing business as Jitney Jungle; Louis N. Ellis, Executor of the Will and Estate of Michael Ellis, Deceased; Jo Ellis, Mrs. Ben Mullen and Miss Ella-Mae Ellis, doing business as George Ellis Food Store; Louis N. Ellis, doing business as Abe's Betty Jean and Port Gibson Trading Co.; H. D. Harwell, doing business as Mack's Package Store; Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store; W. H. Hay, doing business as O. K. Cleaners and Shirt Laundry; Murad Nasif and Mildred Nasif, doing business as M & M. Super Store & Washateria; Port Gibson Lumber & Supply Co., Inc.; Charles R. Dobbs, doing business as Western Auto Associate Store; Kelly D. Conn, doing business as Auto-Lec Associate Store No. 225; A & P Service and Parts, Inc.; Allen Motor Co., Inc.; Donald-Segrest Ford, Inc.; and Mrs. Edgar A. McCaa, doing business as Town and Country, are, on information and belief, individuals, corporations, partnerships and other associations residing and doing business in the State of Mississippi. They are the complainants in the state chancery suit. These defendants are sometimes hereinafter referred to as the "state chancery suit complainants."

8. Defendant Mississippi Action for Progress, Inc. (hereinafter "MAP") is a federally funded anti-poverty agency. MAP was named as a defendant in the state chancery suit. On information and belief, MAP

asserts immunity and other defenses peculiar to it in the state chancery suit. Because plaintiffs believe MAP may be a necessary party to this case in view of the relief hereinafter requested in this Amended Complaint, MAP is named as a party defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure.

FIRST CAUSE OF ACTION

9. Plaintiffs repeat and reallege ¶¶ 1-8 as if fully set forth herein.

10. Plaintiff Henry, many of the members of the class he represents, the NAACP, the State Conference, the Coahoma Branch and the local branches it represents have long been active in attempting to secure the equal rights of the Negro citizens of the State of Mississippi and of the United States. These plaintiffs engage in a wide variety of political, social and economic boycott of certain merchants doing business in the achievement of this goal. Because of the effectiveness of the activities of these plaintiffs, and because of the leadership they exercise, they have frequently drawn the enmity of the white community and its officials. Attempts have been made in the past to destroy the ability of these plaintiffs and others involved in like activities to function. As more particularly appears below, these plaintiffs allege that the state chancery suit is another such attempt.

11. For some time, many persons interested in securing equal and fair treatment for the Negro residents

of the Town of Port Gibson, Mississippi, and surrounding Claiborne County have participated in, publicized, advised and encouraged others to participate in an economic boycott of certain merchants doing business in Port Gibson. The aims of the boycott are to encourage the merchants to treat black patrons with the same courtesy accorded white patrons, to encourage the merchants to follow fair hiring policies, to encourage the merchants to press for equality and fairness in other aspects of life in the community, to educate and encourage black persons not to trade with merchants who do not believe in equality and fair treatment for black persons, and other lawful and just aims. To support the boycott, many persons have engaged in activities protected by the First and Fourteenth Amendments to the Constitution of the United States, such as peaceful picketing and marching, preparation and distribution of handbills, peaceful assemblies in public places to publicize the boycott, and other peaceful and lawful activity designed to support and encourage the boycott, including simple communication by word of mouth. Many members of the plaintiff class described in ¶ 2 above have at one time or another participated in some phase of activity connected with the boycott. On the other hand, many members of that class have not participated in any activities connected with the boycott. Many persons who are not members of the class described in ¶ 2 have also participated in the boycott.

12. These activities of persons supporting the boycott, including the activities of those members of the class described in ¶ 2 above who support the boycott,

are an exercise of their rights of free speech, petition and assembly protected by the First and Fourteenth Amendments to the Constitution of the United States. Said activities have been conducted peacefully and lawfully in public places without any unreasonable interference with the rights of other persons, and on private property only with the consent of the owner. None of the plaintiffs has entered into any "conspiracy" or other agreement with any of the other plaintiffs or other persons to commit any unlawful acts.

13. Despite the peaceful and lawful nature of plaintiffs' activities, the lawfulness of the goals of their protest, and the fact that plaintiffs' activities are protected by the First Amendment, on or about November 3, 1969 the state chancery suit complainants filed their suit against the NAACP, MAP, plaintiff Henry and the individuals he represents here, and the defendant banks described in ¶ 6 above. The state chancery suit sought extraordinarily broad relief which, if granted, would completely stifle the ability of the plaintiffs herein named as defendants in the state chancery suit to continue their protest through the exercise of First Amendment rights. The relief sought in the state chancery suit was, basically, as follows:

(a) That all the lands, funds, property and effects of the NAACP in the State of Mississippi deposited in the defendant banks be attached and held to await the further orders of the chancery court;

(b) That all the defendants in the state chancery suit, except for the banks, be enjoined and prohibited from, among other

things, picketing in or about the premises of the complainants in that suit, boycotting the business of those complainants, asking or demanding that others cease doing business with those complainants, and soliciting or advising any person not to trade with those complainants;

(c) That defendants in that suit, except for the banks, be ordered to pay damages in the amount of $3,542,466.04 to the complainants.

14. The institution of the state chancery suit has already caused and will in the future cause irreparable injury to plaintiffs in the exercise of their First Amendment rights and other protected rights. Because of the fear of liability for an enormous sum of money, possible attachment or garnishment of their funds, and possible subjection to an injunction, many of those members of the class described in ¶ 2 above who have not participated in the boycott or any of the associated First Amendment activities are now afraid to participate in such activities. Many of those plaintiffs whose participation has been minimal have declined to increase or even continue their participation. Many persons who are not plaintiffs herein are afraid to and have declined to participate in the boycott or other protected activities conducted by plaintiffs for fear of being subject to this or a similar lawsuit. Many persons have declined to join or support the activities of the organizational plaintiffs named in ¶¶ 3-5 above for fear that any connection with those plaintiffs might lead to liability. Further, because the state chancery

suit's allegations as to individual defendants therein appear to be based on the mere fact that some of the defendants have simply associated with others who are active in the boycott, many plaintiffs here have fear of even associating with other plaintiffs here. And, as described in ¶ 25 below, the attachments made as a result of the state chancery suit have resulted in actual, present irreparable injury to First Amendment and other rights, as well as further contributing to the chilling effect the state chancery suit has on such rights. In sum, plaintiffs and non-plaintiffs alike, because of the state chancery suit, will tend to steer far clear of areas of protected activity such as those described in ¶¶ 10-12 above, even though such activities are of primary public importance and are protected by the First Amendment to the Constitution of the United States.

15. On information and belief, the state chancery suit was instituted in bad faith, with a purpose to discourage and prevent plaintiffs from exercising their protected rights of free speech, petition and assembly, to discourage plaintiffs from obtaining or attempting to obtain equal rights and fair treatment, and in the hope that the effect on protected rights described in ¶14 above would in fact occur. The state chancery suit is wholly without factual foundation as to its allegations of conspiracy and unlawful conduct, and was instituted without any hope of ultimate success.

16. The institution by the state chancery suit complainants of the state chancery suit constitutes state

action which seeks to deprive plaintiffs of rights protected by the First and Fourteenth Amendments to the Constitution of the United States. In addition, pursuant to the state chancery suit and at the request of defendants named in ¶ 7 above, state officers have already issued writs of attachment and other process, as more particularly appears in ¶¶ 19-30 below. The further threat of use of state power to enforce any injunction or other relief that might ultimately be granted in the state chancery suit constitutes additional state action.

17. Plaintiffs have no adequate remedy at law. There is no adequate and speedy remedy in the state courts to protect plaintiffs' First and Fourteenth Amendment rights. Further, if the chancery court issues any injunction or other relief affecting First Amendment rights, plaintiffs will be prohibited from exercising those rights pending the ultimate outcome of that suit. Any such prohibition would of course impermissibly deprive the plaintiffs of First Amendment rights and impermissibly chill the exercise of such rights.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that plaintiffs and the members of the classes described in ¶¶ 2 and 5 above have the rights, protected by the First and Fourteenth Amendments to the Constitution of the United States, to peacefully picket, march, demonstrate, distribute leaflets or otherwise publicize and protest their grievances of racial discrimination and

denial of equal rights by either the business community or officials of Port Gibson or Claiborne County, to conduct an economic boycott of merchants they believe are acting in a racially discriminatory manner, and to urge others to comply with such a boycott:

(b) issue a preliminary and then permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs to the extent that such a suit infringes or chills the rights described in ¶ (a) above, or infringes or chills plaintiffs' rights to engage in free speech, petition and assembly guaranteed by the First and Fourteenth Amendments;

(c) allow plaintiffs their costs herein, including rea-

(d) grant such other and further relief as may be equitable and just;

(e) retain continuing jurisdiction of this action.

SECOND CAUSE OF ACTION

18. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

19. Immediately upon filing of the state chancery suit, the clerk of the Chancery Court for the First Judicial District of Hinds County commenced to issue and serve writs of attachment on the defendant bank named in ¶ 6 above and the members of the class it represents, ordering said banks to hold funds of the NAACP until further notice.

20. On information and belief, said writs of attachment were purportedly issued pursuant to the provisions of sections 2729-2734 of the Mississippi Code of 1942. Those sections provide, basically, that in an action against a nonresident defendant for damages, the chancery courts shall have jurisdiction (§ 2729) and may attach the property of the nonresident defendant in the hands of a resident defendant simply by filing a complaint and serving an appropriately endorsed subpoena on the resident defendant (§ 2730). The sections further provide that land may be similarly attached (§ 2731), and that in order to free himself of the attachment, the nonresident defendant must give satisfactory security for performing the decree (§ 2733). The state chancery suit complainants alleged in the state chancery suit that the NAACP was a nonresident, so as to come within these sections.

21. The property of several of the plaintiffs deposited in the class of defendant banks described in ¶ 6 above was attached under this procedure, as more particularly appears in ¶ 29 below. As apparently contemplated by sections 2729-2734 of the Code, the plaintiffs whose property was attached were given absolutely no notice that attachment of their property would be made, had absolutely no opportunity for any hearing on the question of the validity of the attachment, no showing was made that plaintiffs were nonresidents and thus subject to attachment, no showing whatsoever of a substantial need for such attachment was made by any person, and no summons or other process was served on any plaintiff.

22. Sections 2729-2734 of the Mississippi Code of 1942 are unconstitutional, null and void on their faces, because they deprive those subject to attachment thereunder of rights secured by the First and Fourteenth Amendments to the Constitution of the United States, in at least the following respects:

(a) The property of a nonresident defendant may be attached without notice to him, without any opportunity for a hearing, without any showing of substantial need for such attachment, and even without summons being served on the nonresident, all in violation of the due process clause of the Fourteenth Amendment;

(b) The nonresident defendant is treated differently from resident defendants without any showing of a substantial state interest in such different treatment, in violation of the equal protection clause of the Fourteenth Amendment;

(c) The sections permit attachment without any judicial findings of need therefor or formal action on petitions for attachment, and thus leave the question whether property should be attached wholly in the hands of private citizens, i.e., the complainants in an attachment suit. The vesting of such broad power in obviously interested private hands constitutes a deprivation by the State of the due process and equal protection of law guaranteed by the Fourteenth Amendment.

(d) The sections are not narrowly drawn so as to encroach as little as possible on the rights to notice, hearing, and other due process rights

involved in attachment proceedings. Because of their overbreadth and vagueness, the statutes violate the due process clause of the Fourteenth Amendment.

(e) Because of the broad power vested in private individuals, as described in ¶ 22 (c) above, and because of the overbreadth of the statutes, as described in ¶ 22 (d) above, the attachment procedure may be and in fact has been applied in this and in other cases to deter, harass, and punish persons engaged in civil rights activities protected by the First Amendment in the State of Mississippi. Because of the attachments permitted against plaintiff and other civil rights organizations, the statutes have a chilling effect on the ability and desire of out of state civil rights organizations to engage in protected activities in the State of Mississippi, and thus the statutes violate the First and Fourteenth Amendments to the Constitution of the United States.

23. The attachments herein, based on statutes which are unconstitutional on their faces, are themselves null and void.

24. Assuming sections 2729-2734 are not unconstitutional on their faces, they have nevertheless been unconstitutionally applied in this case, since as described in ¶ 21 above the fundamental due process requirements of notice and a hearing were not complied with in this case. Accordingly the writs of attachment are null and void as unconstitutionally issued.

25. In addition to the irreparable injury to First Amendment rights described in ¶¶ 14 & 15 above caused by the institution of the state chancery suit itself, these attachments have had the obvious additional effect of wholly preventing the plaintiffs whose property has been attached from continuing their First Amendment activities in support of equal rights and fair treatment for Negroes. As an example, plaintiff Coahoma Branch had on deposit at the time the date chancery suit was filed a large sum of money designated for a voter registration drive, but the account in which that money was deposited has been attached, with the result that the voter registration drive has been destroyed, to the irreparable injury of the Coahoma Branch and those who might have registered to vote.

26. Plaintiffs have no adequate and speedy remedy in the state courts to protect their First and Fourteenth Amendment rights, for the simple reason that attachments similar to those made here have been held valid by the highest state court. It would therefore be futile for plaintiffs to pursue any state remedy to vindicate their First Amendment rights.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that sections 2729-2734 of the Mississippi Code of 1942 are unconstitutional on their faces and as applied in this case in that they deprive persons subject to attachment thereunder of the due process and equal protection of law guaranteed

by the Fourteenth Amendment to the Constitution of the United States;

(b) issue a preliminary and then a permanent injunction restraining the defendant banks named in ¶ 6 above from detaining in any way any funds whatsoever belonging to any plaintiff or member of a class represented by a plaintiff pursuant to any writs of attachment issued in connection with the state chancery suit, and restraining the defendants named in ¶ 7 above from taking any further action to cause the attachment of any funds of any plaintiff or member of a class represented by a plaintiff.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

THIRD CAUSE OF ACTION

27. Plaintiffs repeat and reallege ¶¶ 2-26 as if fully set forth herein.

28. This Court has jurisdiction of this cause because it is ancillary and pendent to the main cause of action.

29. Subsequent to the issuance of the writs of attachment, members of the plaintiff class described in ¶ 5 came to learn that the defendant banks had frozen not only the assets of the NAACP, the nonresident defendant in the state chancery suit, but the assets of members of the plaintiff class described in ¶ 5, who are wholly independent of the NAACP. Those plaintiffs are not parties in the state chancery suit, and thus not subject to the writs of attachment. Further,

the members of the plaintiff class described in ¶ 5 are residents of the State of Mississippi and thus not even subject to the provisions of sections 2729-2734 of the Mississippi Code, which apply only to nonresidents.

30. Section 2729 of the Mississippi Code of 1942 provides for attachments in chancery only in the case of nonresidents. Accordingly, the property of the resident plaintiffs has been attached in violation of section 2729 of the Mississippi Code of 1942.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that the plaintiffs and the class described in ¶ 5 above are residents of the State of Mississippi and thus not subject to the provisions of sections 2729-2734 of the Mississippi Code of 1942;

(b) issue injunctive relief as described in ¶ (b) of the Prayer for Relief of the Second Cause of Action.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

FOURTH CAUSE OF ACTION

31. Plaintiffs repeat and reallege the allegations of ¶¶ 1-17 as if fully set forth herein.

32. On information and belief, the legal theory under which the state chancery suit complainants hope to recover rests on section 2059.3 of the Mississippi

Code of 1942 (1968 Supp.). That section provides that in cases of economic boycotts, when the merchant boycotted "has no direct control or no legal authority to correct" the grievances of the boycotters, or when the merchant has been given "no notice" of the grievances of the boycotters or "no reasonable opportunity to correct such alleged grievance," then the boycotters shall be liable to the merchant in a civil action, and also that the boycotters shall be guilty of a crime punishable by up to two years imprisonment.

33. Section 2059.3 is unconstitutional on its face as violative of the rights of free speech, petition and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, in at least the following respects:

(a) the First Amendment protects the right to trade or not to trade with any person as part of a public protest, and to encourage others to trade or not to trade;

(b) the section would inhibit and have a chilling effect on the exercise of the protected rights described in ¶¶ 10-12 above, which are normally utilized in connection with boycotts;

(c) section 2059.3 is unconstitutionally overbroad and vague, in that assuming the section covers some instances of conduct which the State could properly prevent, it does not specify these instances with any precision and sweeps within its scope conduct fully protected by the First Amendment.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that section 2059.3 of the Mississippi Code of 1942 (1968 Supp.) is unconstitutional on its face as violative of the rights of free speech, petition and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs in which recovery is dependent on the validity of section 2059.3.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

FIFTH CAUSE OF ACTION

34. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

35. The state chancery suit complainants further rely as legal grounds for their suit on the prohibitions against trusts and combines contained in sections 1088 and 1089 of the Mississippi Code of 1942. Those sections prohibit certain trusts, combines, or other agreements in restraint of trade "when inimical to public welfare."

36. Sections 1088 and 1089 may not constitutionally be applied to public issue, First Amendment activity such as that engaged in by plaintiffs herein and de-

scribed in ¶¶ 10-12 above. Plaintiffs limit their attack to the claim that the standard "when inimical to public welfare" cannot be constitutionally applied in the First Amendment area, since it is vague and overbroad. First Amendment rights may be restricted only under specific, narrowly-drawn statutes and regulations, and a standard of "public welfare" cannot meet this requirement. Accordingly, sections 1088 and 1089 of the Mississippi Code cannot constitutionally be applied in this case.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that sections 1088 and 1089 may not constitutionally be applied to restrain First Amendment activities such as those described in ¶¶ 10-12 of this Amended Complaint;

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs in which it is sought to restrict First Amendment rights on the basis of sections 1088 and 1089 of the Mississippi Code of 1942.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

SIXTH CAUSE OF ACTION

37. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

38. Although the state chancery suit involves an action for damages in an amount of more than 3.5 million dollars, plaintiffs will have no right to trial by jury in the chancery court. They may receive a jury trial only in the discretion of the chancellor, under section 1275 of the Mississippi Code of 1942 and decision allow. On the other hand, if the suit were brought in the circuit court, plaintiffs would have an absolute right to trial by jury.

39. Under Mississippi statutory and decisional law, plaintiffs' right to a trial by jury is, essentially, controlled by the manner in which the complainants frame their petition or complaint. Here, by the simple device of coupling a prayer for an injunction with a suit for an enormous amount of damages, the state chancery suit complainants have deprived plaintiffs herein of the right to trial by jury.

40. The Mississippi practice violates the Seventh and Fourteenth Amendments to the Constitution of the United States, since it permits a party to be deprived of a trial by jury at the whim of the opposing party, in violation of the due process of law guaranteed by the Fourteenth Amendment. Further, there is no rational basis or compelling state interest in providing for trial by jury in cases in the circuit courts while denying trials by jury in cases in chancery which may be in substance identical, and thus denial of a jury trial to plaintiffs here would be in violation of the equal protection of law guaranteed by the Fourteenth Amendment.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) declare that plaintiffs are entitled to a trial by a fair and impartial jury in the event that the state chancery suit proceeds to trial, and further declare that the right to trial by jury may not be restricted simply by coupling a prayer for relief cognizable in the chancery court with an action that is in reality an action for a substantial amount of money damages traditionally triable by a jury under Mississippi law and practice.

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from bringing the state chancery suit on for trial on the issue of money damages unless plaintiffs herein are accorded the right to trial by jury in such trial.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

Three-Judge Court Unnecessary

41. Plaintiffs believe that a three-judge court is not necessary to hear the constitutional questions presented by the Second and Fourth Causes of Action since plaintiffs do not seek to restrain the action of any officer of the State, as required by 28 U.S.C. § 2281.

42. Plaintiffs believe that a three-judge court is not necessary to hear the constitutional questions presented by the Fifth and Sixth Causes of Action for the reason described in ¶ 41 above and for the additional reason that those causes of action challenge the appli-

cation of state statutes or procedures to this particular case only, and do not seek a declaration that the statutes or procedures are unconstitutional on their faces.

43. In the event that the Court determines that a three-judge court is required to hear any of the causes of action of this Amended Complaint, plaintiffs request that such a Court be promptly convened, and pending the convening of said Court this Court issue the requested preliminary relief pursuant to the provisions of 28 U.S.C. § 2284(3).

Respectfully submitted,

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MEMORANDUM OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

AARON HENRY, ET AL,

Plaintiffs,

versus No. DC 69-58-S

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,

Defendants.

This action has been submitted to the Court on numerous motions filed herein by the parties. In order to understand the issue presented by the motions it is proper that a chronological resume be made of the procedural steps which have been taken herein.

The many issues before the Court have grown out of the filing of a suit in the Chancery Court, First Judicial District, Hinds County, Mississippi.[1] On or about November 4, 1969, Caliborne Hardware Company, Inc., and others, most of whom are resident citizens of the City of Port Gibson, Claiborne County, Mississippi, filed a Bill of Complaint in the State Court to enjoin the National Association For The Advancement Of Colored People (NAACP), a foreign corporation organized and existing by virtue of the laws of the State of New York, but authorized to do and doing business

[1]This State suit will be referred to in this opinion as the "State Action".

in the State of Mississippi, the Mississippi Action For Progress, (MAP), a non-profit Mississippi Corporation, and numerous individuals from picketing or causing to be picketed and from encouraging or causing to be encouraged a boycott of the businesses of complainants in the City of Port Gibson. The complainants also sought damages from the defendants in the aggregate sum of $3,542.466.04.

The complainants in the State Action prayed for and obtained a non-resident attachment in Chancery against NAACP, *its branches or auxiliary offices* in the State of Mississippi. This relief was sought under Sections 2729, et seq., Mississippi Code, 1942, Annotated, Recompiled (1957), which provde generally for the attachment in Chancery of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state.[2]

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[2]Sections 2729 and 2730, Mississippi Code, 1942, Annotated, Recompiled (1957), provide:

"§2729. Non-residents — absent or absconding debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

§ 2730. Attachment against non-residents — how effects or indebtedness bound.

One of the defendants in the case sub judice, First National Bank of Clarksdale, (FNBC) and fifty-five other banks in the State of Mississippi were made parties defendant in the State Action, and were said to have funds or effects of NAACP, its branches or auxiliary offices, in their hands which were subject to non-resident attachment in the action. Process was issued and duly served in the state on all defendants including FNBC and the other defendant banks named in the complaint.

The Mississippi State Conference of the National Association For The Advancement Of Colored People (State Conference), an unincorporated association, resident of Mississippi, and the Coahoma County Branch Of The National Association For The Advancement Of Colored People (Coahoma Branch), an unincorporated association, resident of Mississippi and a member of the State Conference, filed a verified complaint in the case sub judice on November 7, 1969. The Bank of Clarksdale, Coahoma National Bank, and

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" When a bill shall be filed for an attachment of the effects of a non-resident, absent or abscounding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or abscounding debtor, it shall be sufficient to bind such effects or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon in the nature and object of the suit, and that it is subject to the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or abscounding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service."

FNBC, are named as defendants in the action, and are sued as a class, the members of which are alleged to be all other banks, who were named as defendants in the State-Action.

The complaint alleged that the State Conference is an unincorporated association, a resident of Mississippi and the owner of the property situated within the state; that the Coahoma Branch is an unincorporated association, a resident of Mississippi, and the owner of property situated within the state, and that each member of the class is an unincorporated association, a resident of Mississippi and the owner of property situated within the state.

The State Conference and the Coahoma Branch filed the action through Aaron Henry, a resident of Coahoma County, Mississippi, who is president of both the State Conference and the Coahoma Branch. The Coahoma Branch brought the action in the case sub judice for all other local NAACP Branches within the State of Mississippi.

The plaintiffs allege that although they and each member of the class represented by the Coahoma Branch are authorized by NAACP to use the words "National Association For The Advancement Of Colored People" as a part of the title of their respective associations, and have agreed to abide by the constitution of NAACP, they are completely autonomous and independent of NAACP, and that the branches are autonomous and independent of the State Conference.

The plaintiffs also allege in the complaint that they and the members of the class represented by the Coahoma Branch are not defendants to the State Action.

The plaintiffs allege in the complaint that as a result of the State Action the funds of plaintiffs and members of the class represented by plaintiff Coahoma Branch, have been sequestered in the hands of the banks named as defendants in the State Action and thus, such funds are not available for their use in the promotion of the activities in which they are engaged i.e. activities protected by the First Amendment to the Constitution of the United States designed to secure the equal rights of the Negro citizens of the State of Mississippi and the United States.

The plaintiffs allege, inter alia, that the funds aforesaid have been sequestered in an action to which they and the members of the class represented by the Coahoma Branch are not parties, without notice of any kind or an opportunity to be heard; that the attachment has and will in the future cause extraordinary and irreparable injuries to them and the said class; that plaintiffs and the members of said class are seriously hampered in their day to day activities; that prospective members of or contributors to the branches aforesaid have been frightened and deterred from joining or contributing money to the branches; that persons who would otherwise associate to engage in activities protected by the constitution have been frightened and deterred from engaging in such activities from fear that their property might be attached because of some presumed connection with a non-resi-

dent organization; and that the State Action was filed by the complainants therein with such a callous indifference to the rights of others as to amount to malice and bad faith.

Plaintiffs bring the action sub judice pursuant to 42 U.S.C.A. § 1983, the Civil Rights Statute of April 20, 1871, and invoke the jurisdiction of the court under 28 U.S.C.A. §§ 1331 and 1343.

Plaintiffs moved for a temporary restraining order requiring defendant banks to release the funds aforesaid. The Bank of Clarksdale and the Coahoma National Bank answered the action and affirmatively stated that they did not have possession of or control over any funds subject to the attachment process of the State Action. These defendants were dismissed from the action. The FNBC answered, and acknowledged that it had in its possession and under its control certain funds belonging to the Coahoma Branch.

A hearing was held by the Court on plaintiffs' motion for a temporary restraining order at Aberdeen on November 17, 1969. FNBC Appeared at the hearing and in the course of the trial, moved ore tenus that the complainants in the State Action be made parties defendant to the action, sub judice, on the ground that such parties claimed an interest in the funds in its possession belonging to the Coahoma Branch, and were, therefore, necessary and proper parties to the pending action.

The Court being of the opinion that the action could not proceed to final judgment without the appearance of the complainants in the State Action, directed that such parties be made parties defendant to the action. Pursuant to the Court's order, plaintiffs caused a summons, together with copies of the complaint, motion for preliminary injunction and temporary restraining order issued by the Court, to be served on each of such State Action, complainants as hereinbefore indicated. The Court entered a temporary restraining order requiring FNBC to release all funds in its possession belonging to plaintiff Coahoma Branch, from the attachment issued in the State Action upon the posting by the plaintiffs of a bond in the aggregate amount of the funds attached, plus the sum of $1,000.00. The order provided for steps to be taken by which funds in the hands of other banks, members of the class represented by FNBC, might be released from the attachment process.

The Court set a hearing on the motion for a preliminary injunction at Oxford, Mississippi on December 1, 1969. A hearing was held at the appointed time. The complainants in the State Action appeared in response to the summons issued and duly served upon them, and filed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted and that the Court lacked jurisdiction of the subject matter.

At the conclusion of the hearing the Court announced from the bench his decision to grant the motion for a preliminary injunction and deny the motion to dismiss. The Court requested counsel to prepare an ap-

propriate order. Counsel could not agree on an appropriate order. The Court received proposed orders from counsel for plaintiffs and counsel for defendants, complainants in the State Action. The proposed orders were made a part of the record in the case. The Court entered its own order December 15, 1969, but it was not lodged with the Clerk until December 16, 1969. In the order overruling the motion to dismiss, which was separate from the one ordering the issuance of a preliminary injunction, the Court provided that the said defendants might make application to the Fifth Circuit Court of Appeals for an interlocutory appeal from the order, pursuant to 28 U.S.C. § 1292(b). The said defendants made application to the Court of Appeals for the Fifth Circuit for an interlocutory appeal, which was denied on March 4, 1970.[3]

On the day before the Court's orders carrying into effect the decision of the Court, announced at the hearing on December 1, 1969, were lodged with the Clerk, that is on December 15, 1969, NAACP filed herein a motion to intervene as a party plaintiff. Plaintiffs also filed a motion on that day to make MAP a party defendant.

NAACP, State Conference, Coahoma Branch, individually and on behalf of all others similarly situated, and Aaron Henry, individually and on behalf of all others similarly situated, filed an amended complaint which greatly enlarged the scope of the issues in the case. Aaron Henry appeared in the original complaint

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[3]Claiborne Hardware Co., et al v. Aaron Henry, et al, Misc. No. 1583.

in his official capacity of President of State Conference and Coahoma Branch, but not as an individual. In the amended complaint he appeared as an individual and as representative of a class consisting of all individuals named as defendants in the State Action.

The amended complaint makes MAP a party defendant and in essence makes a direct attack on the State Action. In the first cause of action in the amended complaint plaintiffs seek a declaratory judgment that plaintiffs and members of the class represented by plaintiffs have First and Fourteenth Amendment rights to peacefully picket, march, demonstrate, distribute leaflets or otherwise publicize and protest their grievances of racial discrimination and denial of equal rights by either the business community or officials of Port Gibson or Claiborne County, to conduct an economic boycott of merchants they believe are acting in a racially discriminatory manner, and to urge others to comply with such boycott. In the first cause of action plaintiffs also seek an injunction restraining defendants, complainants in the State Action, from prosecuting the suit.

The second cause of action in the amended complaint seeks a declaratory judgment that Sections 2729-2734, Mississippi Code, 1942, Annotated, Recompiled (1957) are unconstitutional on their face and as applied in the State Action deprive persons subject to attachment thereunder of the due process and equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The second cause of action also seeks an injunction against the defendant banks in the case sub judice from detaining in any way the funds of plaintiffs.

The third cause of action in the amended complaint seeks a declaratory judgment that State Conference, Coahoma Branch and the branches represented by Coahoma Branch as a class are residents of the State of Mississippi and are not subject to the provisions of Sections 2729-2734 of the Mississippi Code of 1942, Annotated, Recompiled (1957). Injunctive relief as prayed for under the second cause of action is also sought under the third cause of action.

In the fourth cause of action in the amended complaint plaintiffs seek to have the Court declare unconstitutional Section 2059.3, Mississippi Code of 1942 (1958 Supp.), (Conspiracy-unlawful restraint of trade-civil liability) and restrain defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or other suits against plaintiffs in which recovery is dependent on the validity of Section 2059.3.

The fifth cause of action in the amended complaint seeks a declaratory judgment that Sections 1088 and 1089 of the Mississippi Code of 1942, Annotated, Recompiled (1957) which prohibit certain trusts, combines or other agreements in restraint of trade when inimical to public welfare, cannot constitutionally be applied to restrain First Amendment activities, such as described in the amended complaint. Injunctive relief is sought restraining defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or any other suit against plaintiffs in which it is sought to restrict First Amendment rights on the basis of said Sections 1088 and 1089.

The sixth cause of action set forth in the amended complaint seeks a declaratory judgment that plaintiffs are entitled to a jury trial in the event the State Action proceeds to trial, and an injunction restraining defendants, complainants in the State Action, from bringing the State Action on for trial on the issue of money damages unless plaintiffs are accorded the right to trial by jury.

The amended complaint does not seek a Three-Judge Court to hear the constitutional issues presented in the second and fourth causes of action, since plaintiffs do not seek to restrain the action of any officer of the state, and, as to the constitutional questions presented by the Fifth and Sixth causes of action, plaintiffs do not seek a Three-Judge Court, since they do not seek injunctive relief against any officer of the state, neither do they seek a declaration that the statutes involved in said causes are unconstitutional on their face, but rather the application of the statutes and procedures to this particular case only.

The amended complaint was filed without plaintiffs having first obtained an order from the Court permitting such to be done. The motion to intervene filed by NAACP, sought leave for NAACP to intervene as a plaintiff in the action, in order to assert the claims set forth in the amended complaint submitted with the motion. The motion was bottomed on the ground that the case sub judice seeks, inter alia, an injunction against the State Court proceedings, in which NAACP is a party defendant and in which it has an interest. NAACP also asserted that its claims involve questions

of law and facts common to those raised by all the plaintiffs in the action.

The plaintiffs filed, on December 31, 1969, a motion for a preliminary injunction restraining defendants, complainants in the State Action, from further prosecuting said action or causing the same to be prosecuted. Plaintiffs assert as grounds for the motion that such an injunction is necessary to prevent irreparable injury to plaintiffs pending the ultimate determination of the case sub judice; to preserve the status quo of the parties until final determination of the action; to permit the Court to grant full and effective relief in the event plaintiffs ultimately prevail; and to prevent expense and waste in the event that plaintiffs are ultimately successful in the action.

On January 6, 1970, defendants, complainants in the State Action, filed a motion for change of venue to the United States District Court for the Southern District of Mississippi, asserting that such a change is warranted for the convenience of the parties and in the interest of justice.

On January 16, 1970, defendants, complainants in the State Action, noticed the depositions at Clarksdale, Mississippi, January 26 — January 30, 1970 of ten individuals, members of the class represented by plaintiff Aaron Henry.

On January 22, 1970 plaintiffs noticed the depositions of six of the defendants, complainants in the State Action, at Clarksdale, Mississippi on February 2, 1970.

On January 28, 1970 defendants, complainants in the State Action, filed a motion to strike the amended complaint and dismiss the action. The basis of the motion is the alleged refusal of the ten individuals noticed for depositions, as aforesaid, to appear for the deposition. There is attached to the motion copy of letter written by plaintiffs' counsel in which the position was taken that the named individuals, though members of the class represented by plaintiff Henry in the suit, were not themselves parties for the purpose of discovery under the Federal Rules, but rather witnesses, who must be dealt with as such. Counsel insisted that to secure the attendance of the individuals at the deposition, they were entitled to the service of subpoenas and payment of fees and mileage, pursuant to the provisions of Rule 45, Federal Rules of Civil Procedure.

There is attached to the motion a copy of a stipulation filed in the case in which it is agreed that notice of the taking of the depositions was duly served on counsel for plaintiffs; that defendants had not personally served the said individuals with subpoenas or other notice of the taking of the depositions, nor had they tendered witness fees or mileage to said individuals; that should the individuals appear for the depositions defendants would not serve subpoenas upon them, nor tender witness fees or mileage; and that plaintiffs' attorneys would not cause the persons named in the notice of the depositions to appear at the time and place indicated.

On January 28, 1970 defendants filed a motion to stay taking of depositions of defendants by plaintiffs until

defendants completed depositions on oral examination of plaintiffs and witnesses. The Court entered an order on this motion on February 5, 1970, staying the taking of depositions by all parties until further orders of the Court.

All outstanding motions were heard by the Court at Oxford, Mississippi on February 26, 1970, at which time the Court took all motions under advisement and requested additional briefs.

The Court has now received and considered elaborate, excellent, exhaustive and extensive briefs from the parties in support of all motions, and has carefully studied and reviewed the entire record in the case.

THE AMENDED COMPLAINT
THE MOTION TO INTERVENE
THE MOTION TO ADD PARTY DEFENDANT

At the threshold the Court must determine whether to recognize the amended complaint filed by original plaintiffs, NAACP, and Aaron Henry, individually, and as the representative of a class composed of all individual defendants in the state action. On this issue rests the determination of many questions here involved.

Defendants[4] question the appropriateness of the Court's action ordering them to be made parties defendant herein on the ore tenus motion of FNBC at the initial hearing in this case.

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[4]The defendants, complainants in the State Action, will be referred to in the remainder of this opinion as "defendants".

As hereinbefore mentioned, the Court's action was prompted by the assertion by FNBC that the Court could not finally determine the issues involved and render complete relief between those already made parties without the presence of defendants. Defendants claim an interest in the deposits of Coahoma Branch witn FNBC to the extent that the money represented thereby may be subjected to the demand of defendants in the state action. FNBC is a mere stakeholder and has no interest in the outcome of the litigation. It is apparent that the Court would be powerless to finally dispose of the case without the presence of defendants, who, by virtue of their claims against the funds mentioned, are indispensable parties. The Court is of the opinion that the Court's action in this regard was proper.

Defendants allege in the State Action that the original plaintiffs herein are branches of NAACP, the nonresident defendant. Thus, one of the issues involved in the case sub judice, is the relationship of the original plaintiffs to NAACP.

Another issue tendered by the original complaint is the contention of the original plaintiffs that the State Action infringes upon their First Amendment Rights.

The amended complaint was filed after defendants appeared in the action pursuant to process served upon them, but before they answered the complaint. At the time the amended complaint was filed FNBC had answered, but gave its consent to the filing of the amended complaint.

Under these circumstances the original plaintiffs were entitled to file the amended complaint as a matter of right without an order of the Court, with the exception that the original plaintiffs could not effectively add parties to the action without the Court's permission.[5]

The original plaintiffs named NAACP as a party plaintiff and MAP as a party defendant in the amended complaint in order to avoid further amendment should the Court sustain in their motion to add MAP as a party defendant and NAACP's motion to intervene.

NAACP seeks to intervene pursuant to the provisions of Rule 24(a) (2) of Federal Rules of Civil Procedure,

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[5]Rule 15(a) Federal Rules of Civil Procedure provides "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *."

It is held in Moore's Federal Practice, Second Edition, Vol. 3, page 851, § 15.07(2):

"The term 'a responsive pleading' as used in Rule 15(a) should be interpreted by reference to Rule 7(a), which defines 'pleadings' as including only the complaint, the answer, the reply, the answer to a cross-claim, and the third-party complaint and answer. So it has been held that a motion to dismiss for failure to state a claim is not a 'responsive pleading' within the meaning of Rule 15, and pleadings may be amended after such motions are made."

As to adding parties, Moore's holds at page 858, in Vol. 3, as follows:

"Rule 21 governs the procedure for dropping or adding parties, and requires an order of the court. Consequently a party may not be added by amendment of the complaint as of course."

See also International Brotherhood of Teamsters v. AFL-CIO, (ED Mich 1963) 32 FRD 441, 7 FR Serv2d 15a.32, Case 2, which holds that an amendment to complaint to add or drop a party requires an order of the court under Rule 21, which controls and limits Rule 15(a).

which provide for intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties", and Rule 24(b) (2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common".

The motion of NAACP to intervene is bottomed on the contention that it is a defendant in the State Action, against which an injunction is sought in the action sub judice, and therefore has an interest relating to the subject matter of the action, and that its claims involve questions of law and fact common to those raised herein by the original plaintiffs.

It is clear to the Court that NAACP cannot intervene herein as a matter of right. While NAACP claims an interest relating to the transaction which is the subject of the action sub judice, it does not claim that its interest is not adequately represented by the existing parties. Both of these elements are necessary when the intervention is sought as a matter of right.[6] Rule 24(a)

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[6] In Atlantis Development Corporation v. United States, 5 Cir. 1967, 379 F.2d 818, at page 825, the court said:

> "Of course F.R.Civ.P. 24(a) (2) requires both the existence of an interest which may be impaired as a practical matter and an absence of adequate representation of the intervenor's interest by existing parties. There can be no difficulty here about the lack of representation."

(2) F.R. Civ. P.

Since NAACP does not claim that the original parties will not adequately represent its interest in the case, intervention cannot be allowed as a matter of right.

If NAACP is permitted to intervene, such must be done under the provisions of Rule 24(b) (2) of F. R. Civ. P.

It is at once apparent that NAACP's claims and the main action herein have questions of law and fact in common.

The general purpose of the Rules of Federal Procedure is that they "shall be construed to secure the just, speedy, and inexpensive determination of every action". F. R. Civ. P. Rule 1.

The Court is of the opinion that the disposition of the case sub judice may as a practical matter impair or impede the ability of NAACP to protect the interest which it claims in the subject matter of the action. In a very real and practical sense the trial of this action is the trial of NAACP's suit as well.

While the decision in the case sub judice will not constitute res judicata or be binding as a matter of law on NAACP, if its motion to intervene is denied, for all practical purposes, the decision will, as a matter of stare decisis, control the trial of the issues in a subsequent separate action by NAACP.

The Court's decision in this case will more than likely be appealed to Circuit Court of Appeals, and the decisurely control the disposition of similar or the same issues in a subsequent separate action between NAACP and defendants.

The Fifth Circuit, in discussing its adherence to the stare decisis doctrine said in *Atlantis,* Note 6, supra:

> "It also assumes that in the subsequent separate trial of the claim of Atlantis against the Government the prior decision would be followed as a matter of stare decisis. Do these assumptions have a realistic basis? Anyone familiar with the history of the Fifth Circuit could have but a single answer to that query. This Court, unlike some of our sister Circuit Courts who occasionally follow a different course, has long tried earnestly to follow the practice in which a decision announced by one panel of the Court is followed by all others until such time as it is reversed, either outright or by intervening decisions of the Supreme Court, or by the Court itself en banc. That means that if the defendants in the main action do not prevail upon these basic contentions which are part and parcel of the claim of Atlantis, the only way by which Atlantis can win is to secure a rehearing en banc with a successful overruling of the prior decision or, failing in either one or both of those efforts, a reversal of the earlier decision by the Supreme Court on certiorari. With the necessarily limit-

ed number of en banc hearings in this Circuit and with the small percentage of cases meriting certiorari, it is an understatement to characterize these prospects as formidable."

* * * *

We are dealing here with a conjunction of a claim to and interest in the very property and the very transaction which is the subject of the main action. When those coincide, the Court before whom the potential parties in the second suit must come must itself take the intellectually straight forward, realistic view that the first decision will in all likelihood be the second and the third and the last one. Even the possibility that the decision might be overturned by en banc ruling or reversal on certiorari does not overcome its practical effect, not just as an obstacle, but as the forerunner of the actual outcome. In the face of that, it is 'as a practical matter' a certainty that an absent party seeking a right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed knows the disposition in his absence will 'impair or impede his ability to protect that interest,' * * * F.R.Civ.P. 24(a)(2)."[7]

In Moore's Federal Practice, Second Edition, Vol. 4, pages 59, 60, § 24.10, the author says "The grant

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[7]379 F.2d 828, 829.

of intervention in many of the discretionary cases will facilitate the disposal in one action of claims involving common questions of law or fact, and thus avoid both court congestion and undue delay and expense to all parties. * * * The most obvious case of permissive intervention, of course, is the situation where an intervenor has a claim against the defendant similar to or identical with that asserted by the plaintiff".

In the case sub judice, aside from the original plaintiffs' claim that they are not subject to nonresident chancery attachment, because of Mississippi citizenship, the claims of NAACP are similar to or identical with those asserted by the original plaintiffs.

Rule 24(b)(2), F. R. Civ. P., provides: "In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties". There is nothing present in the action sub judice which tends to show that the intervention of NAACP will unduly delay or prejudice the adjudication of the rights of the original parties.

The Court is of the opinion that permitting NAACP to intervene in the case sub judice; will avoid undue delay and expense to all parties.

In support of their motion to add MAP as a party defendant it is shown that MAP is a party defendant in the State Action. The same reasons that motivated the Court to permit NAACP to intervene apply to the

F. R. Civ. P. provides "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest * * * * If he has not been so joined, the court shall order that he be made a party".

Rule 21, F. R. Civ. P. provides "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just".

The Court is of the opinion that the motion of plaintiffs to make MAP a party defendant to this action is well taken and should be sustained.

It follows, as a matter of course, after permitting the intervention of NAACP, and directing that MAP be made a party defendant, that the Court should permit the filing of the amended complaint.

MOTION TO DISMISS

Defendants move the Court to dismiss the amended complaint on four grounds.

The first ground reasserts by reference the grounds set forth in the motion to dismiss the original com-

plaint. The Court has previously overruled defendants' motion to dismiss the original complaint. The motion to dismiss the amended complaint for the reasons set forth in the prior motion does not present new or additional principles of law. The motion does not appear to be well taken on the first of the four grounds asserted by defendants.

The second ground asserts that the original complaint cannot be amended while the case is pending on appeal in the Court of Appeals from the Court's order of December 15, 1969, overruling defendants' motion to dismiss for failure of the complaint to state a cause of action. This question is now moot for the reason that on March 4, 1970, the Circuit Court of Appeals, refused to entertain the interlocutory appeal.

The third ground for the motion alleges that the attempted action on the part of the plaintiffs is in controvention of 28 U.S.C. § 2283. The Court is of the opinion that this section is not applicable in the case sub judice.

The fourth ground is in effect, a motion to strike, and, in the opinion of the Court is not well taken.

It is the Court's judgment that the motion to dismiss is not well taken and should be overruled.

MOTION TO STRIKE COMPLAINT AND DISMISS ACTION

Defendants move the Court to strike the amended complaint and dismiss the action. In support of the

motion defendants aver that they noticed the depositions of the individuals described in the amended complaint, as members of the class represented by plaintiff Aaron Henry, and that they willfully refused to appear at the time and place indicated and submit to the depositions. Defendants' motion is directed to the amended complaint in its entirety and does not seek to dismiss the same only as to the said individuals. Defendants argue that the individuals occupy the status of named plaintiffs and are subject to sanctions by the Court for failure to appear and submit to discovery depositions, without being subpoenaed as witnesses.

The plaintiffs contend that the individuals are members of a class represented by an individual plaintiff, Aaron Henry, and do not have the status of named plaintiffs as as to subject them to the discovery rules.[6]

Initially it is noticed that the motion to dismiss is general, and seeks dismissal, not only as to said individuals, but also as to the other plaintiffs who are not charged with failure to respond to discovery procedures. The willful failure of the eight individuals to

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[6]Rule 37(d) F. R. Civ. P. Provides:

"FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

appear for the deposition could not in any view of the matter justify the dismissal as to other plaintiffs. In the case of *Demenlenaere v. Rockwell Mfg. Co.*, D.C. N.Y. 1959, 23 F.R.D. 686, the Court held that the failure of five of eight plaintiffs to appear for taking of their depositions would not justify dismissal as to all eight.

The Court has not determined that the action sub judice can be maintained as a class action on behalf of the individual defendants in the State Action. Rule 23(c) (1) F. R. Civ. P. provides "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained".

It is clear, therefore, that at this stage of the case, the individuals aforesaid are not parties to the action in any sense of the word. They are not named plaintiffs, and the Court has not determined by order that the action may be maintained as a class action for their benefit.

The Court is of the opinion that the motion to strike complaint and dismiss action is not well taken and should be overruled.

The Court has considered but declines to act at this time on the question of whether the said individuals, as members of a class, should be considered in the same category as named plaintiffs for discovery purposes. In the present posture of the case a decision of the question is not necessary.

MOTION TO STAY TAKING OF DEPOSITIONS OF DEFENDANTS UNTIL DEFENDANTS HAVE COMPLETED DEPOSITIONS ON ORAL EXAMINATION OF PLAINTIFFS AND WITNESSES

When this motion to stay was filed the Court was of the opinion that the posture of the case was such that the taking of depositions on oral examination should be stayed until further orders of the Court, accordingly such an order was entered.

The position of defendants is that once they start taking depositions of the parties and other witnesses, they are entitled to proceed until they have concluded the examination of all parties and any other person known to have information concerning the issues involved in the litigation, and during this period the plaintiffs should not be entitled to proceed with discovery depositions in their behalf.

This seems to the Court as an impractable position. Defendants might not conclude their discovery before trial. There is no known legal standard by which plaintiffs could determine when defendants concude the taking of depositions, except to inquire of defendants. In such a situation plaintiffs would be at the mercy of defendants.

The record shows that defendants noticed the taking of depositions of the individuals above mentioned on January 16, 1970. Plaintiffs noticed the depositions of certain defendants on January 26, 1970. Defendants contend that having given notice of the taking of depositions first, they are entitled to proceed not only with

the taking of the depositions of the individuals designated in the notice, but of all other persons whom they desire to depose. Such a procedure would produce absurd results.

The Court is of the opinion that the correct, proper and reasonable rule is stated in Moore's Federal Procedure, Second Edition, Vol. 4, § 26.13(2) page 1151. Professor Moore states: "Also the party having priority is entitled to complete the taking of depositions noticed by him before the adversary party is permitted to institute discovery proceedings-depositions, interrogatories, or production of documents — of his own". (Emphasis supplied)

In the case sub judice defendants noticed the depositions of ten individuals at Clarksdale, Mississippi to begin on January 26, 1970, and to end on January 30, 1970. The notice was served on counsel for plaintiffs on January 16, 1970.

Plaintiffs noticed the deposition of six defendants for Clarksdale, Mississippi on February 2, 1970. The notice was served on January 20, 1970.

Thus, plaintiffs recognized the priority of defendants' depositions during the period of January 26, 1970 and January 30, 1970. This was all that plaintiffs were required to do under the priority rule. Defendants' priority extended only to the depositions already noticed by them.

The motion to stay depositions is not well taken and should be overruled. The parties should be left free to pursue discovery procedure as they desire, subject, of course, to compliance with the Federal Rules and principles of law applicable thereto.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs contend that the Court should preliminarily enjoin defendants from prosecuting the State Action because the trial of that action, while the case sub judice is pending, will effectively deprive plaintiffs of the opportunity of obtaining full and adequate relief in the case sub judice.

Plaintiffs support their motion with the contention (1) that the Court has jurisdiction of the action; (2) that plaintiffs' constitutional rights, particularly First Amendment rights, will be infringed by the State Action while this suit is pending; (3) that fundamental equitable considerations show that preliminary injunctive relief is appropriate, and (3) that 28 U.S.C.A. § 2283 does not bar issuance of a preliminary injunction.

The parties have submitted elaborate and extensive briefs in support of their respective positions on this motion. The Court has given careful consideration to all points urged upon the Court.

The thrust of this action is the claim by plaintiffs that their First Amendment rights have been infringed

by defendants by the utilization of the machinery of the state courts. This, plaintiff contends, satisfies the color of state law requirement.

Section 1331(a), Title 28 U.S.C.A. provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.20, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States".

Section 1343 (3) Title 28 U.S.C.A. provides that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

Section 1983, Title 42 U.S.C.A. provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It was held by the Supreme Court in *Shelley v. Kraemer*, 1948, 334 US 1, 92 L ed 1161 that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provisions of the Fourteenth Amendment (that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In *Edwards v. Habib*, D. C. Cir. 1968, 397 F.2d 687, 694, the court said:

> "A state court judgment, then, even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws."

In *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 11 L ed 2d 686, 697, 84 S Ct 710, 95 ALR 2d 1412, the Supreme Court said:

> "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court — that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of

> speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See e. g., Alabama Code, Tit 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."

The Court is of the opinion that the amended complaint herein states a cause of action cognizable by the Court under 28 U.S.C.A. §§ 1331(a), 1343(3) and 42 U.S.C.A. § 1983.

Defendants charge in the State Action that plaintiffs conspired each with the other to ruin and cause injury to the businesses of the defendants without any purpose of protecting or advancing any legitimate interest of their own. In carrying out this unlawful conspiracy, defendants charge that plaintiffs daily committed malicious, illegal and unlawful acts of injurious falsehoods, deception, force, intimidation, threats, coercion and violence against the customers and prospective customers of defendants. Defendants charge plaintiffs with a secondary boycott of their businesses, maliciously contrived and executed, by coercing the customers and prospective customers of defendants, against their will, to withdraw and withold their beneficial business intercourse from defendants, by the infliction or threat of physical injury to said customers and prospective customers, and by such intimidation as to place

such customers and prospective customers in fear of injury and bodily harm.

The defendants also charge plaintiffs with massive picketing of their places of business; making public speeches against trading with defendants; stationing guards near their businesses to physically stop customers and prospective customers from entering the business premises of defendants and to threaten those who traded with defendants with physical violence; and with many other acts of violence or threatened violence toward customers and prospective customers of defendants, should they trade with defendants.

In sum, defendants charge plaintiffs with carrying into effect a boycott of their businesses, and forcing others to do the same, through picketing, speaking, violence and threats of violence.

As the result of the alleged conduct of plaintiffs, it is charged that defendants suffered large losses in the operation of their businesses for which they seek recovery against plaintiffs in a sum aggregating $3,542,466.04.

Defendants also charge plaintiffs with tortious interference with the rights of defendants to pursue their lawful trades and businesses and the violation of certain statutes of the State of Mississippi relative to restraint of trade. Defendants seek to restrain plaintiffs from picketing and boycotting their businesses and

from violating certain Mississippi Statutes relative to restraint of trade.[9]

Defendants prayed for and obtained a non-resident Chancery attachment[10] of the funds of plaintiffs in fifty-six banks in Mississippi.

Plaintiffs contend that their activities consisted of picketing and boycotting and encouraging others to picket and boycott the businesses of defendants in protest of racial discrimination which had been and was being practiced by defendants in the operation of their businesses, and by the officials of the city in which defendants operated their businesses. Plaintiffs contend that their activities are constitutionally protected by the first amendment, and that, as citizens of the United States, they have the right of the free expression of their views.

The State Action, plaintiffs contend, has a chilling effect upon their activities against which they are entitled to relief in this Court. Plaintiffs seek a preliminary injunction to protect their asserted rights until the case can be tried on its merits.

At the hearing on the motion for a preliminary injunction the Court accepted a copy of the sworn bill of complaint filed in the State Action in lieu of affi-

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[9]Mississippi Statutes which defendants claim were violated by plaintiffs include §§ 1088, 1089 and 1092, Mississippi Code 1942, Annotated, Recompiled.

[10]Id. §§ 2729, et seq.

davits. This document sets forth the facts as have been hereinbefore enumerated.

The plaintiffs submitted the affidavits of eleven individuals, defendants in the State Action. The affidavits are similar. In substance the affidavits relate that the affiants have boycotted the places of business of the defendants, but have not threatened anyone else in regard thereto, nor have they been threatened in the matter; that they have no knowledge of violence or threats of violence to any other party; and that they have engaged in and encourage the boycott to support grievances which they feel are justified that those involved have discriminated and are discriminating against members of the Negro race.

The question presented to the Court on the motion for a preliminary injunction is whether the facts as shown by the sworn bill of complaint filed in the State Court and the affidavits filed herein by plaintiffs present a case where the Court should exercise its injunctive power to maintain the status quo of the parties until the case can be heard on its merits.

There is little doubt but that the right of plaintiffs to peacefully picket and boycott the businesses of defendants and urge others to do so, is a right which they can enjoy, guaranteed to them by the first amendment. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 1968, 391 U S 308, 20 L ed 2d 603, 88 S Ct. 1601; *Thornhill v. Alabama*, 310 U S, 88, 84 L ed 1093; *Kelly v. Page*, 5 Cir. 1964, 335 F.2d 114. The court said in *Kelly*, at page 119, as follows:

"Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment to the Constitution, and made applicable to the states by the Fourteenth Amendment."

On the other side of the coin violence or threats of violence have no protection under the cloak of First Amendment Rights. In *Smith v. Grady*, 5 Cir. 1969, 411 F.2d 181, 188, 189, Judge Coleman speaking for the Fifth Circuit said:

"This Court recognizes, as do all courts, that First Amendment rights are zealously to be protected. In fact, the decision of this case turns chiefly on conduct, rather than speech. Of course, we take into consideration epithets addressed to customers and language which in all reason must be considered as insulting or threatening. At the same time, we are convinced that if peaceful picketing is allowable, as, for instance, not in the furtherance of an unlawful purpose, then a command of absolute silence is constitutionally impermissible.

* * * *

On a picket line, however, and particularly in the support of a boycott of a lawful business, the Constitution affords no protection to speech which is violent, threatening, menacing, insult-

ing, or clearly calculated to provoke a breach of the peace by others."

The defendants contend, however, that 28 U.S.C.A. § 2283 bars the prosecution of this action wherein the plaintiffs seek an injunction against the prosecution of a State Action.

It is provided in 28 U.S.C.A. § 2283 that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

This section of the Code has been the subject of much litigation in recent years, and many decisions have been rendered by appellate and district courts in the nation discussing the applicability of the statute and its scope.

However, the Court need not go further than the Fifth Circuit to dispose of this issue. In the case of *Machesky v. Bizzell*, 5 Cir. 1969; 414 F.2d 283, the court considered an action arising in the Northern District of Mississippi wherein plaintiffs sought injunctive relief against the enforcement of an injunction issued by the State Chancery Court. The Fifth Circuit, speaking through Judge Bell, said:

"Our decision is grounded on the premise that § 2283 is non-jurisdictional in that it is no more than a statutory enactment of the prin-

ciple of comity for application in the relationship between federal and state courts. As such, it is to give way in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights. The question, on this premise, becomes whether appellants alleged such a case."[11]

"We hold that the state court injunction here is unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues. We hold also that where important public rights to full dissemination of expression on public issues are abridged by state court proceedings, the principles of comity embodied in § 2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights."[12]

The Court is of the opinion that the Court is empowered to enjoin the State Action, if the facts of the case justify it, to the extent that such State Action may violate the First Amendment rights of plaintiffs, as hereinbefore discussed.

The recital of the issues drawn in the State Action, hereinbefore contained, indicates to the Court that plaintiffs can legitimately claim that defendants seek

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[11]414 F.2d 287.
[12]414 F.2d 291.

to infringe upon their First Amendment rights, and the prosecution of the State Action will have a chilling effect upon the exercise of those rights. This appears to be a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained. Otherwise, plaintiffs will suffer irreparable injury on account of loss of First Amendment rights pending a solution of the differences between the parties.

The Court does not intend to and does not hold that plaintiffs may not be held to accountability in the State Action for any conduct which is not protected by the first amendment, such as violent, threatening, menacing or insulting conduct, or such as is clearly calculated to provoke a breach of the peace by others.

MOTION FOR CHANGE OF VENUE

Defendants filed a motion for change of venue to the Southern District of Mississippi, asserting in essence that the convenience of the parties and witnesses justified and required such a change.[13] It is not controverted that practically all of the parties who may be affected by the outcome of this litigation, with the exception of the defendant banks, reside in the Southern rather than the Northern District of Mississippi. The scene of the action giving rise to the controversy

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[13]The motion is apparently based on 28 U.S.C.A. § 1404(a) which provides:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

between the parties is Port Gibson, Claiborne County, Mississippi. Port Gibson is situated in the Northern part of the Western Division (Vicksburg) of the Southern District of Mississippi. The Greenville Division of this Court is 115 miles and the Delta Division when the case sub judice is docketed, 185 miles from Vicksburg.

While the Vicksburg Division of the Southern District of Mississippi would be a more convenient forum for the parties and their solicitors, the trial of the case either at Greenville or Clarksdale would not, in the opinion of the Court, create a great or excessive burden on the parties. Counsel for all parties in the case participate frequently in litigation before this Court at all of its division points.

Section 1404(a), Title 28 U.S.C.A., provides that "for the convenience of the parties and witnesses, an interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought". Plaintiffs contend that they could not bring this action in the Southern District of Mississippi for the reason that the three original defendants are citizens of the Northern District of Mississippi. In support of their contention, plaintiffs cite the case of *Hoffman v. Blaski*, 1960, 363 U S 335, 4 L ed 2d 1254, 80 S Ct 1084, in which the court said:[14]

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[14] 4 L ed 2d, 1262.

> "A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. . . . But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff."

Plaintiffs brought this action against three banks as representatives of a class of banks holding funds of plaintiffs, some of whom are residents of the Southern District of Mississippi. Plaintiffs contend that, for venue purposes, the residences of individual members of the class do not control, but only the residences of the named plaintiffs. *Wright, Class Actions*, 47 F.R.D. 169, 182 (1969). This argument does not impress the Court for the reason that plaintiffs could have selected a bank residing in the Southern District of Mississippi as the representative of the class against which to bring the suit. Thus, plaintiffs might have brought the suit in the Southern District of Mississippi.

Additionally, plaintiffs might have brought the suit in the Southern District of Mississippi because the claim arose in that district. Section 1391(b) Title 28 U.S.C.A. provides, "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law". It must be conceded

that this claim arose in the Southern District of Mississippi. The transaction giving rise to the suit occurred in Port Gibson, Claiborne County, Mississippi. The State Action which precipitated this action was filed in the Chancery Court, First Judicial District, Hinds County, Mississippi, in the Southern District. Hence, the claim arose in the Southern District and the suit could have been brought in that district by virtue of Section 1391(b), supra.

The Court is of the opinion that Section 1404(a) supra, authorizes the transfer of this action to the Southern District of Mississippi, should the Court find that a transfer for the convenience of the parties and witnesses, or the interest of justice requires such that a change of venue be granted.

Whether a change of venue should be ordered is a matter largely within the discretion of the Court. *Philip Carey Mfg. Co. et al v. Taylor*, 6 Cir. 1961, 286 F.2d 782, certiorari denied, 81 S Ct 1903, 366 U S 948, 6 L ed 2d 1242. Convenience of the parties will not alone justify a change of venue. The Court must be satisfied that a venue change will also be in the interest of justice.

The case sub judice was filed November 7, 1969. Defendants were made parties to the suit by order of the Court entered on November 17, 1969. Process was served on defendants on or about November 19, 1969. Defendants filed a motion to dismiss the action on December 1, 1969. This motion was overruled by the Court on December 15, 1969, and defendants were permitted to apply to the Circuit Court of Appeals for the Fifth

Circuit for an interlocutory appeal. This was denied on March 4, 1969.

On December 15, 1969, plaintiffs filed a motion to add MAP as a party defendant in the action, NAACP filed a motion to intervene as party plaintiff, and plaintiffs filed an amended complaint. In the meantime the Court entered a restraining order and a preliminary injunction against one of the original defendants, and members of the class represented by such defendant, directing the release of funds attached at the instance of defendants in their suit in the state court.

On December 30, 1969, defendants moved to dismiss the amended complaint, and on December 31, 1969, plaintiffs moved for a preliminary injunction to enjoin the prosecution of the State Action.

The motion for a change of venue was filed on January 6, 1970. Subsequent to the filing of the motion, the parties noticed discovery depositions, and thereafter defendants filed a motion to stay discovery depositions by plaintiffs and a motion to strike the amended complaint and dismiss the action, because of the failure of certain individuals, said by defendants to be parties to the action, to appear for depositions, when noticed to do so.

A hearing was held by the Court on all motions filed in the case on February 26, 1970, at which time affidavits and a copy of the sworn complaint filed by defendants in the State Action were filed with and considered by the Court on the motion for a preliminary

injunction. The motions were argued before the Court and extensive and exhaustive briefs have been prepared by counsel and submitted to the Court for its consideration.

To grant a change of venue in the present posture of the case, in the opinion of the Court, would entail unnecessary expense and result in the waste of time on the part of all parties concerned. It does not appear, at this stage of the case, that the interest of justice will be served by the granting of the motion for a change of venue.

The motion for a change of venue will be overruled. The Court, however, reserves the right to give further consideration to the question as the case advances toward the trial date.

An appropriate order in line with the Court's holding will be entered in the case.

Dated June 9, 1970.

(Signed) ORMA R. SMITH
ORMA R. SMITH
UNITED STATES
DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30295

AARON HENRY, ET AL,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants,
CLAIBORNE HARDWARE COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

(June 23, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: In this interlocutory appeal, filed pursuant to 28 U.S.C.A. § 1292(a),[1]

[1] 28 U.S.C.A. § 1292(a) provides in pertinent part that:
The courts of appeals shall have jurisdiction of appeals

the defendants-appellants, who are also complainants in a pending state civil action instituted by them in Mississippi Chancery Court, contest the propriety and validity of an order of the United States District Court of the Northern District of Mississippi entered on June 9, 1970, in which that court preliminarily enjoined the appellants (hereinafter referred to as "state court complainants") from further prosecuting the aforementioned state civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. A clear picture of what has transpired so far in the court below, and of what is and *is not* raised in this interlocutory appeal, is essential to an understanding of our disposition of this case.

I. Facts and Procedural History

A. *Background*

This controversy began in 1966 when a group of Negro citizens in Port Gibson, Mississippi, began a movement designed to protest what they considered to be racial discrimination practiced by the white merchants and local officials of Port Gibson. The group sought to achieve fair employment practices, fair treatment of Negro customers, and to otherwise elimi-

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from:

> (1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

nate discrimination through the use of economic pressure in the nature of a boycott of the merchants in Port Gibson. The boycott was effectuated by picketing to publicize the action, and by other non-picketing activities such as leafleting and public meetings through which citizens of Port Gibson were encouraged to join the boycott. After this boycott had been in effect for several years, twenty-three white merchants of Port Gibson, who were subject to the boycott, joined in a suit filed on or about November 4, 1969, in State Chancery Court in Hinds County, Mississippi, against (1) the National Association for the Advancement of Colored People, a nonresident (New York) corporation; (2) the Mississippi Action for Progress, Inc. (MAP), a federally-funded nonprofit resident corporation, and (3) approximately 150 named individuals, adult residents of Mississippi alleged to be working "in concert with and under the direction of ... NAACP and MAP." (These three groups of defendants will be referred to hereinafter as the "state court defendants"). In addition, the state court complainants joined as defendants approximately fifty banks in the State of Mississippi alleged to have in their possession funds, property and effects of the nonresident defendant NAACP. The state court complainants alleged that the state court defendants had entered into a conspiracy in restraint of trade, and had engaged in secondary boycotts and other malicious and wrongful interference with the state court complainants' businesses, all in violation of the Mississippi Anti-trust Laws, Miss. Code Ann. 1088, 1089 (1942).[2] Among the allegations of the state court com-

[2] § 1088. *Trust and combine — defined.*

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who is now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any persons, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney-general, from further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

* * * * * *

plaint are charges that the state court defendants abused the customers of the state court complainants by threatening them with physical violence, addressing them with obscene and insulting language, destroying their property, and beating and assaulting them.

1089. *Additional contracts or combinations not allowed by law.*

Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimical to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

(c) Or shall engross or forestall or attempt to engross or forestall any commodity;

(d) Or shall destroy or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another, differences of freight and other necessary expenses of operating business considered.

For relief, the state court complainants sought (A) to have "the funds, property and effects of the nonresident defendant NAACP, its branches or auxiliary offices in the State of Mississippi, in the hands of and under the control of the resident (defendant Banks) ... attached" [presumably as a source of damages] and held to await the decrees and orders of the court; (b) to have all the defendants (except the Banks) enjoined from "(1) Picketing in or about the business premises of the complainants, (2) stationing guards at or near the vicinity of the said premises or the complainants; (3) soliciting, advising, threatening, coercing and constraining any person from trading with complainants; (4) interfering with the businesses of the complainants; (5) boycotting the businesses of the complainants; (6) asking or demanding that others cease doing business with the complainants; and (7) committing acts in restraint of trade and/or in violation of the laws of the State of Mississippi thereto appertaining;" and (C) to recover damages in excess of 3.5 million dollars, for which the state court defendants would be held jointly and severally liable.

Shortly after the filing of this State Chancery suit, and without notice or hearing, the Clerk of the Chancery Court for the First Judicial District Court of Hinds County commenced to serve writs of attachment against what was purported to be the funds of the NAACP on deposit in various Banks around Mississippi, ordering the Banks to hold the funds of the NAACP until further notice. The Clerk's action was

taken pursuant to Miss. Code Ann. § 2730 (1942),[3] which authorizes attachment of the property of non-residents without notice or hearing. It turned out, however, that the Banks upon which the writs of attachment were served had frozen not the assets of the non-resident NAACP, which was a named defendant in the state civil action, but rather the assets of the Mississippi State Conference of the NAACP, and of all local NAACP branches in the State of Mississippi, all of which organizations claim *not* to have been named as defendants in the state civil action, and claim further to be residents of the State of Mississippi and therefore not subject to its non-resident attachment statutes.

B. *Proceedings Below: Stage I*

Believing that their constitutional rights to due process of law had been infringed by these attachments, the Mississippi State Conference and the Coahoma

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[3] §2730. *Attachment against non-residents — how effects or indebtedness bound.*

When a bill shall be filed for an attachment of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or absconding debtor, it shall be sufficient to bind such effect or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service.

Branch of the NAACP, acting individually and on behalf of all other local branches similarly situated, filed a section 1983 action in federal court against the Banks which had frozen their funds pursuant to the writs of attachment. The original complaint in this suit was filed on November 7, 1969, by Aaron Henry, President of both the Mississippi State Conference and the Coahoma Branch. (The parties to the original complaint will be referred to hereinafter as the "original plaintiffs.") The original plaintiffs alleged that although they are authorized by the NAACP, a New York Corporation, to use the words "National Association for the Advancement of Colored People" as part of the title of their respective associations, and have agreed to abide by the constitution of the New York NAACP, they are completely autonomous and independent of the New York NAACP. They alleged further that they were not defendants to the state civil action and had received no notice of the suit, and that they are residents of the State of Mississippi and therefore not subject to its non-resident attachment procedures. Charging that they had been and were being irreparably injured in that all their operational funds, which were used to carry out constitutionally protected activities such as a voter registration drive, had been frozen without notice and hearing, and without even being named in the state civil action, they sought "to enjoin (the) attachment of property belonging to them made without compliance with fundamental constitutional guarantees." The original plaintiffs thus moved for a temporary restraining order and a preliminary injunction. The court below held a hearing on the original plaintiffs' motion for a temporary restraining order

on November 17, 1969, at which one of the defendant Banks appeared and moved to have the state court complainants made parties to the proceeding on grounds that the state court complainants claimed an interest in the contested funds. The court below granted the Banks' motion, as well as the original plaintiffs' motion for a temporary restraining order. The court then set December 1, 1969 for a hearing on the original plaintiffs' motion for a preliminary injunction. At this hearing, the state court complainants appeared and contested the motion. At the conclusion of this hearing, and on the strength of the evidence taken, along with the various pleadings of the parties, the court granted the original plaintiffs' motion for preliminary relief on December 15, 1969, ordering the defendant Banks "to release all funds [of the original plaintiffs] held by them pursuant to the writs of attachment ... upon posting by plaintiffs . . . of a bond in the amount of 110% of [the] funds," and further preliminary enjoining the state court complainants" from subjecting or causing to be subjected in anyway funds of [the original plaintiffs] deposited in the defendant Banks to attachment or other process causing [the original plaintiffs] to be deprived of the use of their funds."

No appeal was taken by either the Banks or the state court complainants from the interlocutory injunction of December 15, 1969.[4] And although it may be within

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[4]At the same time the court below issued its preliminary injunction, it issued a separate order overruling the state court complainants' motion to dismiss the action. *See* Memorandum Opinion in No. DC 69-58-S, at 8 (Appendix, Vol. II, at 195). In the order overruling the motion to dismiss, the court below provided

the scope of our reviewing powers on this appeal to consider the validity of this December 15 interlocutory injunction against the attachments, we decline to do so for several reasons.[5] First, the Banks, against

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that the state court complainants might make application to the Fifth Circuit for an interlocutory appeal from the order, pursuant to 28 U.S.C.A. § 1292(b). The state court complainants did make application to this Court for interlocutory appeal from the district court's order denying their motion to dismiss, and leave to appeal was denied on March 4, 1970. *Claiborne Hardware Co., et al v. Aaron Henry, et al.*, Misc. No. 1583 (March 4, 1970). Although the state court complainants had a *right* to appeal from the denial of the December 15 preliminary injunction pursuant to 28 U.S.C.A. § 1292(a), they chose not to do so, and the time for appealing that order has now lapsed. It is clear that the procedure for taking an appeal from an interlocutory order is precisely the same as that for taking an appeal from a final judgment, and that interlocutory appeals taken pursuant to 28 U.S.C.A. § 1292(a) must be timely filed. *See Dahlen v. Kramer Mach. & Engineering Prod. Co.*, 10th Cir. 1961, 303 F.2d 293; *Stiller v. Squeez-A-Purse Corp.*, 6th Cir. 1958, 251 F.2d 561. *See also* 9 Moore's Federal Practice ¶ 110.21.

[5] Two questions pertaining to the proper scope of our review on this interlocutory appeal present themselves in connection with the December 15, 1969 injunction. First, notwithstanding the failure of both the Banks and the state court complainants to file a timely appeal from the December 15 order, *see* note 4 *supra*, would we have the power to take the matter up in connection with the review of some subsequent appealable order in the case? *See* 9 Moore's *Federal Practice* ¶ 110.21, at 256 (suggesting an affirmative answer); *but cf. Stiller v. Squeez-A-Purse Corp.*, 6th Cir. 1958, 251 F.2d 561 (holding that a party may not circumvent the time requirements for appealing from interlocutory orders by repeatedly moving in the district court to dissolve the interlocutory order, and after repeated orders of denial, appeal from the last order of denial entered in the court, although such an appeal would be untimely if considered as taken from the first order.).

Secondly, if consideration of the first order is not foreclosed by time requirements, would it be within the scope of our review of a subsequent interlocutory order to consider a prior order on our own motion? The general rule governing the scope of review on interlocutory appeals is that "the appellate

whom a major command of the December 15 order runs, are not parties to the present appeal and chose not to appeal the December 15 order when they could have done so.[6] Secondly, the state court complainants, who are the only appellants here, have confined their appeal to questioning the validity of a subsequent interlocutory order of the court entered on June 9, 1970[7]

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court will not go any further . . . than is necessary to decide the matter upon appeal." 9 Moore's *Federal Practice* ¶ 110.25[1], at 269-70. This rule-of-thumb, however, may be only a rule of orderly judicial administration. Once a timely appeal is taken from an order made appealable by statute, some courts have viewed their power to be plenary to the extent they choose to exercise it. *See, e.g., Horwitz v. Directors Guild of America, Inc.*, 2d Cir., 364 F.2d 67, *cert. denied*, 385 U.S. 971, 87 S.Ct. 508 (1966). There is some question, therefore, whether we have the power to consider the December 15 order. Even if our review power on interlocutory appeals is plenary, however, we have decided not to exercise that power in this case for reasons discussed in the text *infra*.

[6] *See* note 4 *supra*. Moreover, the state court complainants' failure to appeal the December 15 order appears to have been deliberate, for at the time they had a right to appeal that order pursuant to 28 U.S.C.A. § 1292(a), they did appeal a separate, certified order of the district court pursuant to 28 U.S.C.A. § 1292(b).

[7] In their notice of appeal the state court complainants appeal only from

> "the interlocutory order of the United States District Court Judge for the Northern District of Mississippi, dated June 9, 1970, preliminary restraining and enjoining, until further order of the district court, the defendant and those persons in active concert and participation with them from prosecuting or causing to be prosecuted that certain action now pending in the Chancery Court of the First Judicial District of Hinds County, State of Mississippi, styled Claiborne Hardware Co., et al v. National Association for the Advancement of Colored People, No. 78, 353 on the docket of said Court, entered in this action on June 10, 1970."

State Court Complainants' Notice of Appeal, Vol. II, Appendix,

(discussed at length hereinafter). Finally, we decline to examine the December 15, 1969 order because we think that an examination of that order would be completely unnecessary to a decision of the questions raised by the June 9 order on which this interlocutory appeal is based.[8] To the extent that we have discussed the December 15 order, we have done so for only two reasons: (1) To set the stage for our discussion of the June 9, 1970 order, and (2) to notify the parties that the December 15 interlocutory injunction against the attachments remains standing,[9] pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim that all their funds have been illegally attached without notice and hearing, pursuant to a Mississippi non-resident attachment statute, when these plaintiffs are in fact residents of the State of

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at 258-59.

No mention is made of the December 15, 1969, order in the Notice of Appeal, nor have the appellants — state court complainants — briefed whatever questions may be raised by the December 15 order. *See, e.g.*, text accompanying notes 19-20, *infra*.

[8] None of the parties have suggested that the December 15, 1969 order interferes in anyway with the pending state civil action. *Cf. Lynch v. Household Finance Co.*, D. Conn. 1970, 318 F. Supp. 1111, 1115. And, indeed, we have difficulty seeing how it could interfere if the situation is as the original plaintiffs contended — that is, if the organizations against whom the attachments run are not even parties to the pending state suit. *See also* text accompanying notes 19-20, *infra*.

[9] Neither party to this appeal has suggested that the interlocutory injunction of June 9, 1970 (discussed hereinafter) superseded in any way the interlocutory injunction of December 15, 1969, *cf. Dahlen v. Kramer Mach. and Engineering Prod. Co.*, 10th Cir. 1961, 303 F.2d 293, nor does our study of the Record indicate that the December 15, 1969 order has been affected in any way by the subsequent orders of the district court.

Mississippi and not even parties to the state civil suit, the filing of which generated the attachments. *Cf., e.g., Wisconsin v. Constantineau*, ____ U. S. ____, 91 S. Ct. 407 (1971). As we proceed to what really concerns us on this appeal, therefore, we understand that the Banks and the state court complainants are presently preliminarily enjoined from withholding or causing to be withheld, pursuant to writs of attachment issued in connection with Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, Mississippi, funds belonging to the original plaintiffs deposited in the defendant Banks.

C. *Proceedings Below: Stage II*

Several days following the day on which the district court announced its decision to issue a preliminary injunction restraining the withholding of the original plaintiffs' funds,[10] the plaintiffs took steps which greatly enlarged the scope of the issues in the case. Specifically, the NAACP and MAP, both named defendants in the state complainants' pending antitrust suit, were added as parties to the instant suit, and Aaron Henry, who appeared in the original complaint in his official capacity as President of the State Conference and the Coahoma Branch, but not as an individual, appeared in the amended complaint as an individual representing the class consisting of all indi-

[10]**The district court actually announced its decision from the bench at the conclusion of the hearing on December 1, 1969. The order was not formally entered until December 15, 1969, the day the original plaintiffs failed their motion to add the state court defendants to the suit.**

viduals named in the State Chancery suit. At this time, the plaintiffs also filed an amended complaint which requested substantially broader relief than originally requested. Generally, the amended complaint sought further relief in the form of (1) an injunction restraining the state court complainants from further prosecuting the pending State Chancery suit, and (2) a declaratory judgment that the anti-trust statutes upon which the state court complainants were relying in the State Chancery suit were unconstitutional on their faces or as applied to the state court defendants.[11]

On December 31, 1969, the original plaintiffs, together with the newly added state court defendants, filed a motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery action. The state court complainants replied with numerous motions of their own, and all outstanding motions were heard by the district court on February 26, 1970. On June 9, 1970, obviously after careful deliberation, and accompanied by a lengthy and thoughtful memorandum opinion which has been very helpful to this Court, the district court entered its order granting, *inter alia*,[12] the motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery suit. It is from this order enjoining their pending

[11] *See* note 2 *supra*.

[12] Numerous other motions were granted or denied in the district court's June 9 order. We consider none of them — only that portion of the order granting the motion for a preliminary injunction.

antitrust suit in State Chancery court that the state court complainants now appeal. First, they challenge the jurisdiction of the district court. They contend that the district court lacked jurisdiction because (a) there is no section 1343(3) question presented in the complaint since the requisite "state action" to a civil rights action cannot be found in the mere filing of a private civil tort action in state court; and (b) there is no section 1331(a) federal question presented in the complaint since the amended complaint contains no more than what the state court defendants' defense would be to the State Chancery suit and the matter in controversy does not exceed $10,000.[13] Secondly, they urge that 28 U.S.C.A. § 2283, the anti-injunction statute, is an absolute bar to enjoining their pending state civil suit. Finally, they argue that "plaintiffs have no absolute right to picket, march and demonstrate." Because we have decided that federal jurisdiction was lacking to support the cause of action alleged in the amended complaint, we do not reach the second and third issues.

II. Jurisdiction

Federal district courts have jurisdiction of actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the federal constitution or any Act of Congress providing for the equal rights of citizens. 28 U.S.C.A. § 1343(3) and

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[13] *See* note 15 *infra*.

42 U.S.C.A. § 1983.[14] 1 W. Barron & A. Holtzoff, *Federal Practice and Procedure* ¶ 37 (Wright ed. 1960). It is, of course, essential to this "civil rights" jurisdiction that the deprivation of rights contested be "state action."[15] The difficult problem has always been to

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[14] 28 U.S.C.A. § 1343(3) provides in pertinent part that

> [t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privliege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . .

42 U.S.C.A. § 1983, which is the statute creating a civil rights cause of action cognizable under 28 U.S.C.A. § 1343(3), provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[15] It is likewise essential to federal question jurisdiction under 28 U.S.C.A. § 1331(a) that there be "state action" when the federal question alleged is one "arising under" the Bill of Rights and the Fourteenth Amendment. *See Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563, at 565. *See also Hampton v. City of Jacksonville*, 5th Cir. 1962, 304 F.2d 320, 322; *Smith v. Holiday Inns of America, Inc.*, 6th Cir. 1964, 336 F.2d 630. In the instant case, the state court defendants predicated jurisdiction not only on section 1983 and 28 U.S.C.A. 1343(3), but also on the Bill of Rights as applied to the States by the Fourteenth Amendment. Since "state action" is required for both, however, to decide the jurisdictional issue under 28 U.S.C.A. § 1343(3) is also to decide the jurisdictional issue under 28 U.S.C.A. § 1331(a). The two concepts have long been considered identical. *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, at note 7 (1966).

pinpoint the boundary between state action and non-state, or private, action. In this case, we must decide on which side of the boundary lies the mere commencement of a private tort suit in state court.

Relying primarily on *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964) and *Shelly v. Kramer*, 334 U.S. 1, 68 S.Ct. 836 (1948),[16] the district court held that "state action" may be found in the filing of a suit between private parties in state court. Both these decisions, therefore, deserve our careful attention. *New York Times* began as a civil suit between private parties in the state courts of Alabama. It resulted in a judgment in the Supreme Court of Alabama against the *Times*. In its opinion on certiorari, the United States Supreme Court devoted only a short paragraph to the problem of judicial involvement in a private lawsuit. It said:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a

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[16]The district court also relied on *Edwards v. Habib*, D.C. Cir. 1968, 397 F.2d 687, *cert. denied*, 393 U.S. 1016, 89 S.Ct. 618 (1969). It is true that *Edwards v. Habib* contains pages of discussion on the problem of "state action." In those pages, Judge Wright discussed many possible theories of resolving "state action" problems, but he rested his decision on none of them. In fact, he concluded that it was not necessary to decide whether there was "state action" in the case, because the case could be decided merely by construing an Act of Congress. As the only concurring judge pointed out, therefore, the dictum on "state action" was nothing more than "constitutional speculation" and for that reason the concurring judge declined to join in that part of the opinion. *See* 397 F.2d at 703. (Concurring opinion of McGowan, J.)

> state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute . . . The test is not the form in which state power has been applied but, whatever the form, *whether such power has in fact been exercised.*

376 U.S. at 265, 84 S.Ct. at 718 (emphasis added).

Shelly v. Kramer also began as a private civil suit in state court, where one party was seeking judicial enforcement of a racially restrictive covenant in a deed. The courts of Missouri enforced the covenant, and the United States Supreme Court on certiorari held that state enforcement of a private discriminatory contract violates the fourteenth amendment. The clear message of *Shelly v. Kramer* is that it is judicial *enforcement* of a private discriminatory contract that brings the otherwise "private action" within the ambit of the fourteenth amendment. What is common to both *Shelly* and *New York Times*, therefore, that is not present in our case, is that "state action" was found in those cases only *after* a final judgment or otherwise dispositive order[17] on the merits had been rendered by the state court. In contrast to these cases in which

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[17] *See Machesky v. Bizzell*, 5th Cir. 1969, 414 F.2d 283, 286 where the Court suggests that an injunction granted by a state court may constitute "state action."

some dispositive action has been taken by a court, there is a long line of cases which conclude that a state, by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state. *See Skolnick v. Martin*, 7th Cir., 317 F.2d 855, *cert. denied*, 375 U.S. 908, 84 S.Ct. 199 (1963); *Skolnick v. Spolar*, 7th Cir., 317 F.2d 857, *cert. denied*, 375 U.S. 904, 84 S.Ct. 195 (1963); *Moffett v. Commerce Trust Co.*, 8th Cir., 187 F.2d 242, *cert. denied*, 342 U.S. 718, 72 S.Ct. 32 (1951); *Campo v. Niemeyer*, 7th Cir. 1950, 182 F.2d 115; *Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563; *Bottone v. Lindsley*, 10th Cir. 1948, 170 F.2d 705, *cert. denied*, 336 U.S. 944, 69 S.Ct. 810 (1949). *See also Jones v. Jones*, 7th Cir. 1969, 410 F.2d 365, *cert. denied*, 396 U.S. 1013, 90 S.Ct. 547 (1970); *Rhodes v. Meyer*, 8th Cir., 334 F.2d 709, *cert. denied*, 379 U.S. 915, 85 S.Ct. 263 (1964); *Sarelas v. Porikos*, 7th Cir. 1963, 320 F.2d 827; *Wardrop v. Ross*, W.D. Pa. 1970, 319 F. Supp. 1299; *Drexler v. Walters*, D. Minn. 1968, 290 F. Supp. 150; and *Pritt v. Johnson*, M.D. Pa. 1967, 264 F. Supp. 167 (holding that attorneys who participate in litigation are not acting under color of state law within the civil rights statute). The leading case on this question, which presents a fact pattern very similar to the case at hand, seems to be *Stevens v. Frick*, 2d Cir., 372 F.2d 378, *cert. denied*, 387 U.S. 920, 87 S.Ct. 2034 (1967). *Stevens* was an action to enjoin the defendant from further prosecuting a pending civil suit for libel in the Pennsylvania courts on grounds that the mere filing and pendency of the suit "chilled" the plaintiffs' first amendment rights. Like the plaintiffs herein, the plaintiffs in *Stevens* relied on *Shelly*

v. Kramer to support civil rights jurisdiction in the case. The Second Circuit rejected this argument and, distinguishing *Shelly*, stated the following:

> By contrast (with *Shelly v. Kramer*), in this case no order or judgment has been entered under which the power of the state is invoked to suppress the Stevens book, nor is there any Pennsylvania statute or case which authorizes the imposition of unconstitutional restraints on freedom of the press .... Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that *merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state* ....

372 F.2d at 381 (emphasis added). The court concluded therefore that Stevens did not have a claim cognizable under the Civil Rights Act.

The reason for the principles enunciated in the above-cited cases is manifest: Judicial bodies are supposed to be neutral; perhaps their most magnificent feature is their accessibility to all claimants, no matter how unfounded those claimants' contentions may turn out to be. To say that an open courthouse door constitutes "state action" is to assume that the party whose private suit is challenged as "state action" already has the court on his side before the adjudicatory

process even commences. The essence of "state action," as defined in *Burton v. Wilmingtom Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961), is action in which the "[s]tate has so far insinuated itself into a position of interdependence [with the otherwise "private" person whose conduct is said to violate the fourteenth amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." 365 U.S. at 725, 81 S.Ct. at 862. To apply this test to the mere filing of a private civil complaint in a state court and conclude that "state action" results would be to demean the judicial process. It would be to forget that a court is an open forum before which each party is to have a full and fair opportunity to make his case. Only after both parties to a private civil action here had their day in court and the court has reached its decision and rendered its judgment does the full power of the state come into play in enforcing the judgment. We need only look at the status of the pending civil suit in the instant case to demonstrate this principle. As things stood at the time the court below issued its preliminary injunction, there were no indications what, if any, evidence the state court complainants would be able to produce to support their various allegations of violent and abusive conduct, nor were there any indications whether the state court complainants would be able to substantiate their claimed loss of 3.5 million dollars. Thus, from a factual standpoint, it was entirely uncertain whether the state court complainants would even be

able to carry their burden of proof in the case. From the standpoint of the legal questions presented, the state court complainants were proceeding to court armed with state antitrust statutes which, from all appearances, no Mississippi court has ever applied in a noncommercial situation. The state court defendants, on the other hand, no doubt would have armed themselves with the First Amendment to the United States Constitution and numerous Supreme Court opinions holding that their right to picket peacefully is constitutionally protected. At the time the court below issued its injunction, the Mississippi Chancery court had made no dispositive determinations, factual or legal, on any of these difficult issues. In other words, the State, through its courts, had taken a stand on neither side of this very difficult controversy.

The effect of the relief the state court defendants seek in this Court, through their argument that the state court complainants' use of the Mississippi courts constitutes "state action," would be to shut the doors of the Mississippi courts to its citizens before those citizens have an opportunity to present their case. For us to take such a step, the situation must be drastic indeed. We are asked to take the step, however, on grounds that the state complainants' suit is unfounded and that its mere pendency chills the state court defendants' first amendment freedoms. *But see Younger v. Harris*, ____ U.S. ____ at ____, 91 S.Ct. 746, at 754 (1971). Remedies exist in our system of justice for unfounded suits in the common law actions for malicious

prosecution and abuse of process.[18] And it is through the faithful enforcement of these remedies, rather than through denying access to the courts in the first instance, that, for the most part, the menace of bad faith private litigation should be controlled. The state defendants argue, however, that the "state action" needed to support their amended complaint attacking the state court complainants' antitrust suit can be found in the aforementioned prejudgment attachments of funds belonging to the various original plaintiffs. They rely heavily on the recent Supreme Court decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1971). *Sniadach* involved the constitutionality of a Wisconsin prejudgment garnishment procedure. The debtor's wages in that case were garnished. She moved in state court that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment, and the Supreme Court of Wisconsin sustained the lower court in approving the procedure. The United States Supreme Court reversed, holding that the procedure violated the due process requirements of the Fourteenth Amendment. Although the Court did not address itself to the question whether "state action" was present in the garnishment procedure, implicit in its holding that the procedure violated the Fourteenth Amendment is the conclusion that "state action" was present, since "state action" is required to invoke the protection of the Fourteenth Amendment. *See Hall v. Garson,*

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[18]Mississippi jurisprudence recognizes a cause of action for abuse of process or malicious prosecution. *Allen v. Ritter*, 235 So.2d 253 (1970); *Wutzke v. Wayne Lee's Grocery and Market, Inc.*, 199 So.2d 438 (1967); *Kitchens v. Barlow*, 164 So. 2d 745 (1964).

5th Cir. 1970, 430 F.2d 430, 439-40. Of course, as we have made clear at the outset of this opinion, neither the validity of the attachments below nor the validity of the December 15 preliminary injunction against them is presented to us on this appeal. It is not necessary, therefore, for us to say whether, *taken alone,* involved "state action" for federal jurisdictional purposes. But even assuming for the moment that "state action" was involved in the attachments, we do not think it can be fairly said that such "state action" extends to the entire underlying private antitrust suit.

The very nature of the garnishments attacked in *Sniadach,* and of the attachments attacked below, makes it clear that these ministerial acts should be treated as separate matters from the suits underlying them. This much is indicated in the following language from *Sniadach,* describing the procedure under attack in that case:

> What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby wages are frozen. *They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard* and to tender any defense he may have, whether it be fraud or otherwise.

395 U.S. at 338-39, 89 S.Ct. at 1821 (emphasis added). The administrative acts complained of in *Sniadach*, and, it may be argued, in the attachments below, had an indisputable aspect of finality wherein the full authority of the State was brought to bear on the complaining party.[19] But obviously this does not mean that there was any finality or any "state action" about the still pending "main suit" (as it was referred to in *Sniadach*), or "underlying suit" (as we shall call the state court complainants' antitrust suit here). Thus, to say that the "state action" contained in a summary garnishment, such as that in *Sniadach*, or that may be contained in a prejudgment attachment, such as that below, clothes the entire underlying suit in the garb of "state action" when no evidence has been presented in the underlying suit and no decision on the merits reached, is to sweep too broadly. Most of the time, the prejudgment procedure bears no meaningful relation to the underlying suit; it is true that the institution of the underlying suit triggers the prejudgment procedure, but that is as far as the relationship goes. Thereafter, the prejudgment procedure takes place regardless of the merits or substantive content of the underlying suit. In reality the prejudgment procedure

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[19] As a general rule, of course, the ministerial acts of a court's officers, who in the performance of their official responsibilities issue process and levy execution, are not considered to be action under color of state law. *Dinwiddie v. Brown*, 5th Cir., 230 F.2d 465, *cert. denied*, 351 U.S. 971, 76 S.Ct. 1041 (1956); *Schatte v. International Alliance*, 9th Cir., 182 F.2d 158, *cert. denied*, 340 U.S. 827, 71 S.Ct. 64 (1950). *See also Hanna v. Home Insurance Co.*, 5th Cir. 1960, 281 F.2d 298, *cert. denied*, 365 U.S. 838, 81 S.Ct. 751 (1961). The distinction between these cases and the *Sniadach*-type case can be found, we think, in the *effect* of the particular administrative act in question.

is usually a separate matter, and clearly courts should be capable of treating it separately. Certainly, in the instant case, the prejudgment attachments should be viewed separately from the underlying suit predicated on the Mississippi antitrust laws. Under the Mississippi non-resident attachment statute, the writs would have issued regardless of what the underlying suit involved. As the state court defendants pointed out in their brief in this Court, under the Mississippi non-resident attachment procedure, the complaining party has complete control over whether a prejudgment attachment is made; all the statute requires is that the complaining party state the nature and object of his suit on the summons, and the Clerk will then serve the writs regardless of the merits of the complaining party's underlying suit. Moreover, in the instant proceedings the parties themselves consistently have treated the attachments as a separate matter from the suit. And justifiably so, for, as we pointed out earlier, the attachments ran against persons who allegedly *were not even parties* to the state "antitrust" suit. It must be remembered that the original plaintiffs below sought and obtained injunctive relief first against *only* the attachments on the strength, in part, of their contentions that they *were* residents and were *not* parties to the pending state suit. And the issuance of the injunction against the attachments apparently interfered in no way with the prosecution of the pending civil suit, for the state court defendants thereafter found it necessary to enter the instant proceeding and seek the much broader relief of an injunction against the pending state suit itself *Cf. Lynch v. Household Finance Corp.*, D. Conn. 1970, 318 F. Supp. 1111, 1115. Finally, on this

appeal the state court complainants have not appealed from the order enjoining the attachments, while they have appealed from the order enjoining the pending, underlying suit. What we are saying, therefore, is that the "state action" which may be found in ministerial acts performed in connection with a prejudgment attachment does not necessarily extend to the otherwise wholly private action of *a still undecided* underlying pending civil suit;[20] on the facts of this case, it most certainly does not.

Since we conclude that there is no "state action" to be found in the mere filing of a private civil tort action in state court, the district court's order of June 9, 1970, enjoining the prosecution of the pending state civil action should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

VACATED and REMANDED with directions.

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[20] *See* notes 4-9, *supra*, and accompanying text.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30295

AARON HENRY, ET AL,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants,

CLAIBORNE HARDWARE COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 23, 1971, 5 Cir., 1971, ____ F.2d ____).

(September 16, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearingu En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30295

D. C. Docket No. DC 69-58-S

AARON HENRY, ET AL,
Plaintiffs-Appellees,

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Defendants,
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Appeal from the United States District Court for the Northern District of Mississippi

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Before RIVES, THORNBERRY and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1971